REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 495 OF 2010

(An Appeal arising out of the conviction and sentence of L.W. GICHEHA – SRM delivered on 10th September 2010 in Thika CMC. CR. Case No.3577 of 2009)

ROBERT NGANGA MWANGI…….....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Robert Nganga Mwangi was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 19th July 2009 at Kirwara Village, Kandara District, the Appellant, jointly with others not before court, while armed with pangas robbed Meshack Nganga Maina of two mobile phones worth Kshs.20,000/- and immediately before such robbery threatened to use actual violence to the said Meshack Nganga Maina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification yet the circumstances then prevailing were not conducive for positive identification. He was aggrieved that the trial court had relied on the evidence of a single witness to convict him without warning herself of the danger of relying on such evidence. He faulted the trial court for convicting him on the basis of a defective charge. He was aggrieved that the trial court had relied on contradictory and inconsistent evidence to convict him. He was of the view that the contradictions and inconsistencies should have been resolved in his favour. He accused the trial court of failing to take into consideration that he was a child within the meaning of the **Children Act**. He should therefore not have been sentenced to serve the death sentence. He was finally aggrieved that the trial court had not taken into consideration his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. He told the court that he was a schoolmate of the complainant and further that there existed a grudge between him and the complainant. Mr. Karuri for the State conceded to the appeal. He told the court that the circumstances of the case were such that the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** was not proved to the required standard of proof. He also took issue with the fact that the trial court had not investigated the claim by the Appellant that he was seventeen (17) years at the time of his arrest and trial. If that were the case, then the Appellant should have been tried as a child and should not have been

sentenced to suffer death. He urged the court to allow the appeal.

Before giving reasons for our decision, the following are the brief facts of the case:

Meshack Nganga Maina (the complainant) was at the material time a Form 3 student at Kirwara High School. He had hired a room near the school where he used to live. He told the court that on 6th July 2009 at about 11.00 p.m. while he was asleep in his room, two men entered the room and demanded that he hands them his mobile phones. Although it was dark, he was able to identify the Appellant by his voice. The Appellant was his schoolmate. He referred to him as Robert. The two men were able to gain access to the room because he had locked the door of the room with a nail. He told the court that although the two men were armed, they did not harm him. They threatened him using a panga. On the day following the robbery incident, he reported the incident to Gaichanjiru AP Post. He was referred to Kirwara Chief's Camp.

According to the complainant, after making the report to the Assistant Chief, the Assistant Chief accompanied him to the home of the Appellant where they found the Appellant. The Appellant was told to surrender the mobile phone. He told them that the mobile phone was kept at his uncle's house. They were able to recover one of the mobile phones from the house of the Appellant's uncle. The evidence regarding the recovery of the mobile phone was contradicted by PW3 Karanja Kiarie, the Assistant Chief of Karimwaro Sub-location. He told the court that after the incident had been reported to him, he went to the house of the Appellant and recovered the mobile phone in a bag which was hanging on the wall in the room where the Appellant was found sleeping. PW3 was emphatic that the mobile phone was recovered in the room that the Appellant was found in and not in another house as stated by the complainant. The mobile phone was produced in court as an exhibit. The complainant testified that he was able to identify the mobile phone because it had the markings **"MN"** behind it. **"MN"** is the initials of his name. The Appellant was arrested and taken to Kandara Police Station. He was received by PW4 CPL Bernard Kilonzo who investigated the case. He found that there was sufficient evidence to charge the Appellant with the present offence.

When the Appellant was put on his defence, he told the court that he was a Form 3 student at the school where the complainant was also a student. He denied robbing the complainant of the mobile phones. He narrated the circumstances leading to his arrest and prosecution. He testified that the contradictory circumstances of the recovery of the mobile phone exonerated him from the offence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We re-evaluated the evidence adduced in this case. We have also considered the grounds of appeal put forward by the Appellant. We have considered the submission made before us, both oral and written. The Appellant was convicted on the basis of two pieces of evidence: that of identification and that of the recovery of the stolen property soon after the alleged robbery. According to the complainant, he was robbed on the night of 19th July 2009 from his room near Kirwara Secondary School where he was a

student. He told the court that he was able to identify the Appellant by his voice. The Appellant was well known to him prior to the robbery. In fact, the Appellant was a fellow student. He referred to him as his friend. He told the court that the Appellant, accompanied by another, entered his room, threatened him using a panga, and then robbed him of two mobile phones. He made a report to the Area Assistant Chief. The Area Assistant Chief led him to the house of the Appellant where the mobile phone was recovered. There was contradiction in the evidence of the complainant and that of the Area Assistant Chief in regard to where the mobile phone was allegedly recovered. Whereas the Assistant Chief testified that the mobile phone was recovered in the room where the Appellant was found, the complainant testified that the Appellant led them to the house of his uncle where the mobile phone was recovered. In our considered view, the circumstance of the recovery of the mobile phone is material evidence which touches on the credibility of the complainant's testimony. It is not possible that two witnesses who were in the same place at the same time to be unable to tell where the mobile phone was recovered.

We have taken into consideration the entire circumstances of this appeal and we are of the view that there are certain facts that the trial court did not take into account when deciding the case. The trial court did not take into account the fact that the Appellant and the complainant were schoolmates. In fact, they were friends. The claim by the complainant that he was robbed by the Appellant is incredible taking into account the fact that when the Assistant Chief asked the Appellant to surrender the mobile phone he willingly did so. In our considered view, there appeared to have been a disagreement between the Appellant and the complainant which should have been resolved in other forum other than by the Appellant being charged with the present offence. We are also of the view that the trial court ought not to have tried the Appellant without first establishing his age. If the Appellant was seventeen (17) years at the time of his arrest and trial, he should have been tried by the Children's Court. Even if he were to be convicted of the offence, he should not have been sentenced to suffer death.

We agree with the Appellant that the evidence adduced by the prosecution witnesses was full of contradictions and inconsistencies that we are unable to find that the prosecution proved its case on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. Mr. Karuri for the State, correctly in our view, conceded to the appeal.

In the premises therefore, the conviction of the Appellant cannot be sustained. It is hereby quashed. The appeal is allowed. The Appellant is acquitted of the charge. The sentence imposed upon him is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE